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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/849,509	05/19/2004	Laurence C. Mudge	0624-4129	6774
27123 7590 01/10/2008 MORGAN & FINNEGAN, L.L.P. 3 WORLD FINANCIAL CENTER NEW YORK, NY 10281-2101			EXAMINER PRYOR, ALTON NATHANIEL	
			ART UNIT	PAPER NUMBER
			1616	
			NOTIFICATION DATE	DELIVERY MODE
			01/10/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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jmedina@Morganfinnegan.com

Office Action Summary	Application No. 10/849,509	Applicant(s) MUDGE, LAURENCE C.	
	Examiner Alton N. Pryor	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 November 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8,10-17,20-35,37 and 38 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8,10-17,20-35,37,38 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicant's arguments filed 11/21/06 have been fully considered but they are not persuasive. See below.

Objection to Oath / Declaration is withdrawn

Claims 1-8, 10-17, 20-35,37,38 are objected to until receipt of new oath / declaration. The oaths are still defective in one small area and the claims must be rejected because of that - the oath must state the inventor "is the original and first inventor. The phrase "and first" has been left out. For the above reason, the objection is maintained.

Applicant's response

The Applicant has provided a corrected oath / declaration. However, the oath / declaration provided on 11/21/07 needs further correction. See discussion above.

New Rejections

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory

double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-8,10-17,20-35,37,38 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-40 of U.S. Patent No. 5643852. Although the conflicting claims are not identical, they are not patentably distinct from each other because both instant claims and claims in USPN 5643852 are to inventions comprising the treatment of turfgrass (bentgrass and bermudagrass) with a composition comprising a monoester salt of a phosphorous acid and phthalocyanine such as pigment blue 15. The inventions differ from one another in that instant invention excludes mancozeb. Although the patented claims do not specifically exclude mancozeb, the patented claims do not make mancozeb a required component. Therefore patented claims like instant claims can be free of mancozeb. For this reason, USPN '852 makes obvious the instant claims.

Claims 1-8,10-17,20-35,37,38 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19 of U.S. Patent No. 5665672. Although the conflicting claims are not identical, they are not patentably distinct from each other because both instant claims and claims in USPN 5665672 are to inventions comprising the treatment of turfgrass (bentgrass and bermudagrass) with a composition comprising a monoester salt of a phosphorous acid and phthalocyanine such as pigment blue 15. The inventions differ from one another in that instant invention excludes mancozeb. Although the patented claims do not

specifically exclude mancozeb, the patented claims do not make mancozeb a required component. Therefore patented claims like instant claims can be free of mancozeb. For this reason, USPN '672 makes obvious the instant claims.

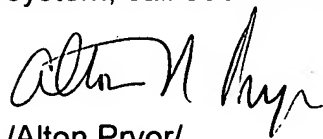
Claims 1-8,10-17,20-35,37,38 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 5336661 in view of Nesteruk et al (PL 103345; 5/31/79). Although the conflicting claims are not identical, they are not patentably distinct from each other because both instant claims and claims in USPN 5336661 are to inventions comprising the treatment of turfgrass (bentgrass and bermudagrass) with a composition comprising a monoester salt of a phosphorous acid. The inventions differ from one another in that instant invention excludes mancozeb. Also USPN '661 does not make claim to an invention comprising phthalocyanine compounds such as pigment blue 15 as instantly claimed. However, Nesteruk discloses that pigment blue is present in fungicidal compositions for staining purposes. With respect to the instant claims lacking a phthalocyanine compound such as pigment blue 15, it would have been obvious to modify the claims of USPN '661 to include the pigment blue compound recited in the instant claims. One would have been motivated to do this since PL '345 discloses that pigment blue is applied for the purpose of marking a location. Although the patented claims do not specifically exclude mancozeb, the patented claims do not make mancozeb a required component. Therefore patented claims like instant claims can be free of mancozeb. For the above reasons, USPN '661 in view of PL '345 makes obvious the instant claims.

Telephonic Inquiry

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton N. Pryor whose telephone number is 571-272-0621. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



/Alton Pryor/
Alton Pryor
Primary Examiner
AU 1616